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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL ALLEN RICHARD,

Defendant and Appellant.

A122044

(Alameda County  
Super. Ct. No. CH42559)

Paul Allen Richard timely appeals his jury trial conviction on one count of continuous sexual abuse of a child, in violation of Penal Code section 288.5, subdivision (a).<sup>1</sup> He contends the trial court committed an ex post facto violation when it applied section 1170 as amended effective March 30, 2007, to a crime committed between 1996 and 2002. He further alleges that the trial court abused its discretion when it imposed a \$2,000 restitution fine. We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

The information filed on April 6, 2007, charged appellant with continuous sexual abuse of a minor under the age of 14 years, in violation of section 288.5, subdivision (a). The information alleged that acts of abuse took place between January 1, 1996, and January 1, 2002, while appellant resided with, and had recurring access to, the child.

The victim, who was 15 years old at the time she reported the crime, had been molested by appellant from the time she was 7 years old until the time she was 12 years

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<sup>1</sup> All further statutory references are to the Penal Code.

old. The molestation consisted of digital penetration and oral copulation. The incidents occurred nearly nightly for the first several years, then every other night for several more years. The molestation stopped when the victim was 12 years old.

The jury found appellant guilty as charged. The court sentenced him to the upper term of 16 years, and imposed a restitution fine of \$20,000. The court later modified and reduced the restitution fine to \$2,000.

When it sentenced appellant to the upper term, the court considered circumstances relating to the crime specified in rule 4.421, subdivision (a) of the California Rules of Court: “(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; [¶] . . . [¶] (3) The victim was particularly vulnerable; [¶] . . . [¶] (8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism; [¶] . . . [¶] The defendant took advantage of a position of trust or confidence to commit the offense.” Under rule 4.421, subdivision (b) of the California Rules of Court, the court found that appellant “engaged in violent conduct that indicates a serious danger to society.” After finding multiple circumstances in aggravation and no circumstances in mitigation, the court imposed the upper term sentence of 16 years.

## **DISCUSSION**

### ***I. Application of Amended Section 1170 Did Not Violate the Prohibition Against Ex Post Facto Laws***

Appellant perpetrated his offense between 1996 and 2002, and was sentenced in 2008. He contends that application of the version of the determinate sentence law, section 1170 that became effective in March 2007, to impose an upper term sentence of 16 years was ex post facto because under the earlier version of section 1170, he would have been presumptively entitled to a middle term sentence of 12 years. He argues that his sentence should be reduced in accordance with the version of section 1170 that was in effect at the time he committed his offense. Following *People v. Sandoval* (2007) 41 Cal.4th 825, we conclude that application of the amended statute did not disadvantage appellant and therefore there was no ex post facto violation.

### **A. Ex Post Facto Principles**

Federal and state constitutions prohibit ex post facto laws. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9; *Collins v. Youngblood* (1990) 497 U.S. 37, 41; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288.) We interpret the ex post facto clause in the California Constitution no differently than its federal counterpart. (*People v. Snook* (1997) 16 Cal.4th 1210, 1220.)

The traditional understanding of the ex post facto clause was expressed in *Calder v. Bull* (1798) 3 U.S. 386, 391, which set out four categories of ex post facto laws: a law that criminalizes and punishes an act that was innocent when committed; a law that elevates the categorization of a crime such as from a misdemeanor to a felony; a law that inflicts a greater punishment than authorized when the crime was committed; and a law that alters the rules of evidence to allow less or different evidence to convict than when the crime was committed. This formulation was reaffirmed in *Collins v. Youngblood*, *supra*, 497 U.S. at page 42. The court in *Collins* further explained that the prohibition established by the ex post facto clause bans legislatures from retroactively altering the definition of crimes or increasing the punishment for criminal acts. (*Id.* at p. 43.) The relevant inquiry is whether the law increases the penalty by which the crime is punished. (*California Dept. of Corrections v. Morales* (1995) 514 U.S. 499, 506, fn. 3; *People v. McVickers* (1992) 4 Cal.4th 81, 84.)

The test to determine whether a law violates the ex post facto clause has two parts: “a law must be retrospective—that is, ‘it must apply to events occurring before its enactment’—and it ‘must disadvantage the offender affected by it,’ . . . by altering the definition of criminal conduct or increasing the punishment for the crime . . . .” (*Lynce v. Mathis* (1997) 519 U.S. 433, 441.)

### **B. The Trial Court Did Not Violate the Prohibition on Ex Post Facto Laws by Applying Amended Section 1170**

When appellant first began to molest the victim in 1996, section 1170 provided a presumption that ordinarily a defendant was to be sentenced to the middle term. An upper term sentence could be imposed only if the trial court found certain aggravating

factors. The United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, held that the Sixth Amendment requires the truth of any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be conceded or determined by a jury. In *Cunningham v. California* (2007) 549 U.S. 270, the court held that the middle term sentence specified for a crime under California law was, in effect, a statutory maximum sentence because under section 1170, it was the maximum sentence that could be imposed based solely on the jury's verdict. (*Cunningham v. California, supra*, at pp. 288-289.)

In response to the court's decision in *Cunningham*, the California Legislature amended section 1170, subdivision (b) to provide judges with discretion to determine the appropriate term of confinement following conviction, thus rejecting the presumptive middle term. (See *People v. Sandoval, supra*, 41 Cal.4th at p. 836, fn. 2.) "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." (Stats. 2007, ch. 3, § 2.) The change empowered trial courts to choose between alternative terms of confinement without the need for proof of aggravating circumstances. (*People v. Sandoval, supra*, at pp. 846-847.)

In *Sandoval*, our Supreme Court considered whether a defendant had been improperly sentenced to the upper term under the former version of section 1170. (*People v. Sandoval, supra*, 41 Cal.4th at p. 837.) The defendant claimed that the imposition of the upper term violated her Sixth Amendment rights, as established in *Cunningham*, because the aggravating circumstances cited by the trial court were based on facts that were neither admitted by the defendant nor established by the jury verdict. (*People v. Sandoval, supra*, at pp. 837-838.) The court agreed with the defendant and concluded the error was not harmless because it was unable to find, beyond a reasonable doubt, that the jury would have found the facts the trial court used to impose the upper term sentence. (*Id.* at pp. 838-843.) The court remanded for resentencing and instructed the trial court to determine, in the exercise of its discretion, which of three alternative terms would be imposed. (*Id.* at pp. 843-852.) The court decided *Sandoval* after section

1170 was amended, and its remedy was the equivalent of applying the amended version of the statute. (*Sandoval, supra*, at pp. 845-846.)

In *Sandoval*, the defendant claimed she would be disadvantaged by the court's choice of remedy because under the former version of section 1170, she would have been presumptively sentenced to the middle term. (*People v. Sandoval, supra*, 41 Cal.4th at p. 854.) The court stated that whether there was an ex post facto clause violation depended on the significance of the adverse impact on the defendant. (*Ibid.*) Because the defendant had previously been sentenced to the upper term, the application of the amended sentencing law would not result in a harsher term but would vest the greatest discretion in the court, which would include the power to impose a lower term. (*Id.* at pp. 854-855.) In general, the court said of the amendments to section 1170, "the removal of the provision calling for imposition of the middle term in the absence of any aggravating or mitigating circumstance is not intended to—and would not be expected to—have the effect of increasing the sentence for any particular crime." (*People v. Sandoval, supra*, at p. 855.) The court concluded that there was no ex post facto violation and remanded the case for sentencing according to the amended statute "in a manner consistent with the Sixth Amendment as interpreted in *Cunningham*." (*Id.* at p. 843.)

Here, appellant asserts a similar argument to the one considered by the court in *Sandoval*. He says he was entitled to be sentenced, under former section 1170, to the presumptive middle term of 12 years, and the application of the amended sentencing law is ex post facto. But the amendments to section 1170 removed the presumptive middle term thereby giving sentencing judges the discretion not just to impose the upper term, but the lower term as well. (*People v. Sandoval*, 41 Cal.4th at p. 855.)

Our analysis is consistent with the United States Supreme Court's decision in *Carmell v. Texas* (2000) 529 U.S. 513, which appellant cites to for the proposition that retrospectively lowering the standard of proof for an offense violates the ex post facto clause. In *Carmell*, the trial court applied an amended statute, which authorized conviction of certain sexual offenses on the victim's testimony alone, to offenses committed before the statute's effective date. The court held this was a violation of the

ex post facto clause. (*Id.* at pp. 530-533.) In *Carmell*, the court held that the relevant inquiry was “whether the law affects the quantum of evidence required *to convict*.” (*Id.* at p. 551.) Here, the application of section 1170 did not affect the quantum of evidence required to convict appellant. It did no more than change the application of a preexisting range of penalties specified for appellant’s offense.

The application of section 1170 as amended did not violate the ex post facto clause.

## ***II. The Trial Court Did Not Abuse Its Discretion By Imposing a \$2,000 Restitution Fine***

The trial court initially ordered appellant to pay a \$20,000 restitution fine. The court then reduced the fine to \$10,000 after considering that appellant was on Social Security and Supplemental Security Income (SSI). Later, the court further reduced the restitution fine to \$2,000. On appeal, appellant contends that the trial court abused its discretion by imposing the \$2,000 restitution fine pursuant to section 1202.4, subdivision (b). We reject this argument.

Section 1202.4, subdivision (b)(1) requires the trial court, following a felony conviction, to impose a restitution fine of not less than \$200, and not more than \$10,000, unless the court finds compelling and extraordinary reasons for not doing so. The trial court has the broad discretion to set the amount of a restitution fine and is not required to state reasons for imposing the fine. (*People v. McGhee* (1988) 197 Cal.App.3d 710, 716.) Moreover, the defendant bears the burden of demonstrating his or her inability to pay. (§ 1202.4, subd. (d).)

Here, appellant was found guilty of continuous sexual abuse of a child under the age of 14. The court noted at sentencing that the victim “pretended to be asleep so she didn’t have to face the horror” of the offenses being perpetrated against her. It was well within the discretion of the trial court to consider evidence of the “seriousness and gravity” of the offense and conclude that a \$2,000 fine was appropriate. (§ 1202.4, subd. (d).)

Additionally, the amount of the restitution fine, which is “at the discretion of the court and commensurate with the seriousness of the offense,” requires no statement of formal reasons on the record. (§ 1202.4, subd. (b)(1).) The court need not make an express finding “as to the factors bearing on the amount of the fine” and need not hold a “separate hearing for the fine.” (§ 1202.4, subd. (d).) Unless, there are “ ‘compelling and extraordinary reasons,’ ” the defendant’s “lack of assets” and “limited employment potential” are not germane to his or her ability to pay the fine. (*People v. McGhee, supra*, 197 Cal.App.3d at p. 715; § 1202.4, subd. (c).) In the absence of a contrary showing the court is entitled to presume the defendant will pay the fine out of future earnings. (*People v. Frye* (1994) 21 Cal.App.4th 1483, 1486-1487; § 1202.4, subd. (d).)

In the present case, there is ample support in the record for an implied finding of appellant’s ability to pay the \$2,000 fine. Appellant was receiving \$800 a month in SSI payments. At the time of his arrest, appellant earned income from collecting scrap metal and working as a handyman. Appellant has failed to meet his burden of demonstrating that the trial court abused its discretion by imposing a \$2,000 restitution fine to be paid from his future earnings.

### **DISPOSITION**

The judgment is affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.